THE RECORD

OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

VOLUME SIXTEEN

1961

THE RECORD of The Association of the Bar is published at 42 West 44th Street, New York 36. Editorial inquiries should be addressed to the Executive Secretary. Information on exchange arrangements may be secured from the Librarian of the Association.

THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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Volume 16 | JANUARY 1961 | *Number* 1

Association Activities

THE DECEMBER Stated Meeting was held in honor of the Judges of the United States Court of Appeals, Second Circuit, and the Judges of the United States District Court for the Eastern and Southern Districts of New York. Following the buffet supper Chief Judge Lumbard spoke in the Meeting Hall, as did Chief Judge Ryan and Chief Judge Bruchhausen.

Interim reports were received from the Committee on Corporate Law, Covington Hardee, Chairman; the Special Committee on Family Law, Jacob L. Isaacs, Chairman; and the Committee on Patents, Norman N. Holland, Chairman.

PUBLISHED IN this issue of THE RECORD is the address delivered by The Rt. Hon. Lord Birkett. At the meeting he addressed Lord Birkett was made an Honorary Member of the Association. In presenting the honorary membership, the President of the Association said:

"Lord Birkett—The year 1945 was one of great portent. In that year the Second World War ended, Mr. Harrison Tweed was elected President of this Association and for the second time, you, sir, were chosen as Master of the Company of Curriers.

"If ancient Livery Companies existed in this City, I wonder whether

Mr. Tweed or any of his successors could have aspired to be Master of one of them? I leave it to our members to decide whether he would have qualified as Master of the Long-Bow String Makers, the Silk Throwers, the Pin Makers, the Brewers—certainly not the Starch Makers! But being Master of a famous Company was but one of many of the notable honors that have come to you.

"We think of you here, of course, as a great lawyer—one of the best England has produced. That you were a great barrister was discovered by Mr. A. E. Bowker even before he became your clerk. In 1920 he found you in the Lord Chief Justice's Court arguing what he describes as a "very dull point of law." He hastens to add that you were not dull, "For," says Mr. Bowker, "he is one of the few men at the Bar who cannot possibly be dull no matter what type of case he is engaged in. He has a quality of being able to lift the most uninteresting legal argument out of its mediocre drabness and give it life." "I was very impressed," says Mr. Bowker, "and felt that 'here was a winner'!" Mr. Bowker was right.

"Even before you took silk in 1924 your days and nights were filled to overflowing with a rapid succession of interesting and important trials and appeals. Your reputation as the Bar's leading expert on the mysteries of arsenic poisoning was early established in the Pace and Salmon Sandwich cases. Indeed you seem to have participated either as prosecutor or defense counsel in virtually every important murder trial in England over a 20-year period.

"Libel and slander, collisions at sea and on the land, breach of promise, breach of contract, charges of negligence, even police court matters—litigation of every kind and description came to your chambers at No. 3 Temple Gardens. Yet even such a variety could hardly have prepared you for cross examination of the witness who drifted off into mediumistic trances from time to time!

"The clients you served must have been a source of never ending satisfaction to you—in terms of fees earned and otherwise. The fabulously wealthy Maharajah, the leading newspapers of England, the accused in the Brighton Trunk murder case and the scores of others you defended against charges of murder and lesser crimes: the Mayfair Playboys, the assessor in the Great Fire Conspiracy case, the directors of the ill-fated Austin Friars Trust, Lord Gladstone in vindicating his father's memory—to mention a few at random.

"And in between the great cases you prosecuted or defended, you always found time, in each year of your busy practice, to serve as counsel for the penniless litigant in both civil and criminal matters. These cases, moreover, not infrequently involved lengthy trials and hearings. You fought for your Legal Aid clients, as your law clerk records, as though you were serving the Indian Maharajah at a thousand guineas a day.

"So glamorous a practice comes to a very few indeed. And, I suspect, this must have made it difficult for you to accept appointment to the High Court of Justice in 1941. There you served with great distinction in the King's Bench Division until your designation as a Lord Justice of Appeal in 1950.

"Lord Birkett, I have mentioned a few of the many honors which have

come to you. You have carried them all with characteristic grace. You had an outstanding career at Emmanuel College, Cambridge, of which you were made Honorary Fellow in 1946; you were President of the Cambridge Union; you were called to the Bar of the Inner Temple in 1913 and took silk in 1924; you have been a member of Parliament; you have been Judge of the King's Bench Division, High Court of Justice, and a Lord Justice of Appeal; you are now a member of the Privy Council; four great English universities have given you honorary degrees; you have held that ancient and honorable office of Justice of the Peace; you have been Treasurer of the Inner Temple and President of The English Association and of the Holdsworth Club; you sat in judgment at the historic trials in Nuremberg.

"At the present time, you are President of the Pilgrims of Great Britain, a fitting office indeed in the light of your many years of friendly contacts with this country. Many of us recall your visits in years gone by at meetings of the American Bar Association and at this Association.

"Lord Birkett: We cherish you in this House because of the many friends you have made among our members and we honor you because of your outstanding career as a lawyer, as a judge and as one of your country's most eloquent spokesmen in many causes dear to our hearts. On a more homely note, we even envy you your recreations, which you tell us are occasional golf, gentle walking, reading and writing. As evidence of the friendship and admiration we hold for you, our Executive Committee has elected you to Honorary Membership in this Association.

"This is an honor we reserve for very few and we trust that your election will bring you back among us on many occasions in the future."

THE TEAM from Ohio State University College of Law won the National Moot Court Competition. The team from The University of Oklahoma, College of Law, placed second in the competition. Members of the Ohio team were: John C. McDonald; and Shelby V. Hutchins. Members of the Oklahoma team were: James D. Batchelor, Gene T. Bonner and Jerry L. Salyer. Mr. McDonald of the Ohio team won the award for the best individual oral argument. The Harrison Tweed Bowl, awarded for the best brief in the competition was won by Tulane University School of Law.

Judges on the final court were: The Honorable Stanley H. Fuld, Judge, New York Court of Appeals; The Honorable Edward Weinfeld, United States District Judge, Southern District of New York; The Honorable Lawrence E. Walsh, Deputy Attorney General of the United States; Whitney North Seymour, President

of the American Bar Association; Simon H. Rifkind, former United States District Court Judge; Archibald Cox, Professor of Law, Harvard University Law School; and the President of the Association.

Teams representing 101 law schools from all parts of the country participated in the competition. Additional prizes won by the championship team included the John C. Knox Award, the Felix Frankfurter Prize and the John W. Davis Cup, presented by the American College of Trial Lawyers.

JUDGE IRVING R. KAUFMAN, of the United States District Court for the Southern District, New York, was a guest of the Committee on Courts of Superior Jurisdiction, Walter R. Mansfield, Chairman. Judge Kaufman discussed with the Committee the desirability of having a permanent panel of pre-trial masters in the Southern District of New York to pass on motions related to discovery and similar interlocutory matters. Judge Kaufman is a member of the National Pre-trial Committee of the Judicial Conference of the United States.

FORMER PRESIDENT Louis M. Loeb has been appointed by the Mayor a member of the Board of Health. The Board is composed of the Commissioner of Health and four members with terms of eight years. Members of the Board are Dr. Leona Baumgartner, Commissioner of Health, Chester I. Barnard, Dr. Lewis Thomas and Dr. Samuel Z. Levine. Mr. Loeb replaces Professor Paul R. Hays as a member of the Board.

THE HONORABLE Harold J. McLaughlin, President Justice of the Municipal Court, was a guest at the November meeting of the Committee on the Municipal Court, Joseph E. Dyer, Chairman. The President Justice discussed with the Committee a number

of problems with which the court is concerned, the proposed consolidation of the courts and his court's legislative program.

"THE VALIDITY of Alabama and Mexican Divorces" was the subject of a well attended symposium sponsored by the Committee on Medical Jurisprudence, Morris Ploscowe, Chairman. Speakers were Warren S. Reese, Jr. of the Alabama Bar, Jason R. Berke of the New York Bar, and Judge Ploscowe. Jacob L. Isaacs, Chairman of the Association's Special Committee on Family Law, presided.

SURROGATE Christopher C. McGrath discussed "The Need of Another Foley Commission" at a meeting of the Section on Wills, Trusts and Estates. The Chairman of the Section, Edward Ridley Finch, Jr., reviewed current decisions.

THE SPECIAL Committee on the Study of Commitment Procedures, Allen T. Klots, Chairman, held a special meeting in December to which were invited the Justices of the Supreme Court, First Department. Some twenty judges attended the meeting and discussed with the Committee the present commitment procedures and reviewed with the Committee some of the problems which the Committee is studying. The meeting also afforded an opportunity for the judges to discuss with Dr. Paul H. Hoch, the Commissioner of Mental Hygiene, who is a member of the Committee, the administration of the state's hospitals for the mentally ill.

SENIOR UNITED STATES Circuit Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, has advised Chief Justice Earl Warren that all five of the Advisory Committees on

Federal Rules of Practice and Procedure are fully operating and going full speed ahead. "The time has now come," Judge Maris advised the Chief Justice, "for the bench and bar to cooperate in our review of the Federal rules by giving the Advisory Committees the experience and views of the practicing lawyer, the judge, and the law teacher, and by making concrete recommendations for improvements."

The Committees, composed of nationally-recognized judges, lawyers, and legal scholars, were appointed during the last year by Chief Justice Warren pursuant to the Act of July 11, 1958 [P.L. 85–513, 72 Stat. 356], authorizing the Judicial Conference of the United States, of which the Chief Justice is Chairman, to make a continuous study of the Federal rules.

THE COMMITTEE on the Surrogates' Courts has recommended to the Judicial Conference that the Conference undertake a study of whether procedures on accountings in the surrogates' courts should be conformed to Article 79 of the Civil Practice Act.

THE ASSOCIATION was represented at hearings on the new zoning resolution held by the Board of Estimate, by the President of the Association and Mendes Hershman, a member of the Executive Committee and a former chairman of the Committee on Real Property Law. The Committee's report on the new zoning resolution was published in THE RECORD in March, 1960.

A GRADUATE course in estate planning is offered for the fifteenth year by the Division of General Education of New York University. Joel Irving Friedman, former Chairman of the Association's Section on Wills, Trusts and Estates, is the lecturer. Sessions meet Tuesday evenings from 7:00 to 9:00 P.M. from February 21 to April 11 at a mid-town center. Topics include: Marital Deduction; Life Insurance; Wills; Trusts and Powers of Appointment;

Special Types of Trusts; the Buy-Out Agreement and Stock Redemption. A detailed brochure is available upon application to the Division of General Education.

THE COMMITTEE on Real Property Law, Warner H. Mendel, Chairman, is studying some of the problems raised in New York as the result of the addition to the Internal Revenue Code of Sections 856–858, affording special tax treatment to "real estate investment trusts."

THE COMMITTEE on Trade Regulation, Edward F. Johnson, Chairman, in cooperation with the Section on Trade Regulation, Edward L. Rea, Chairman, will sponsor symposia on mutual aid pacts and "market definition."

THE SPECIAL Committee on Banking Law, Henry Harfield, Chairman, has completed a study and commentary on the decision in *Securities and Exchange Commission* v. *Guild Films Co., Inc.* A few additional copies of this report are available on request to the Chairman of the Committee at 20 Exchange Place, New York 5.

The Calendar of the Association for January and February

(as of December 30, 1960)

January	3	Dinner Meeting of Committee on Labor and Social Security Legislation
January	4	Dinner Meeting of Executive Committee
January	6	*Twelfth Night Festival.* Sponsorship Committee on Entertainment
January	9	Dinner Meeting of Committee on Professional Ethics Dinner Meeting of Special Committee on Housing and Urban Development Dinner Meeting of Special Committee on Science and Law Meeting of Section on Corporate Law Departments
January	10	Dinner Meeting of Committee on Aeronautics Dinner Meeting of Committee on Insurance Law Dinner Meeting of Special Committee on Banking
January	11	Meeting of Section on Wills, Trusts and Estates Dinner Meeting of Committee on Legal Aid Dinner Meeting of Committee on Real Property Law Dinner Meeting of Committee on International Law
January	16	Dinner Meeting of Committee on Medical Jurisprudence Dinner Meeting of Committee on the Bill of Rights Dinner Meeting of Committee on Trade Marks and Unfair Competition
January	17	*Stated Meeting of the Association,* 6:15 P.M., *Buffet Supper,* 8:00 P.M. Meeting of Committee on Arbitration Meeting of Committee on State Legislation
January	18	Meeting of Committee on Admissions Dinner Meeting of Committee on Federal Legislation Dinner Meeting of Committee on Courts of Superior Jurisdiction Dinner Meeting of Committee on Foreign Law Meeting of Committee on Municipal Affairs

January	19	Dinner Meeting of Committee on Trade Regulation Dinner Meeting of Committee on Atomic Energy
January	23	Meeting of Library Committee Dinner Meeting of Committee on Family Law Dinner Meeting of Committee on Copyright Symposium: "Preparation and Trial of a Malpractice Action." Sponsorship Committee on Medical Jurisprudence
January	24	Meeting of Committee on State Legislation Dinner Meeting of Committee on Domestic Relations Court Dinner Meeting of Committee on Trade Marks and Unfair Competition Dinner Meeting of Committee on Administrative Law
January	25	Meeting of New York State Bar Association Section on Food, Drug and Cosmetic Law
January	26	New York State Bar Association Annual Meeting
January	27	New York State Bar Association Annual Meeting
January	28	New York State Bar Association Annual Meeting
January	31	Meeting of Committee on State Legislation Dinner Meeting of Special Committee on Banking
February	1	Meeting of Section on Wills, Trusts and Estates
February	6	Dinner Meeting of Committee on Professional Ethics Dinner Meeting of Committee on Corporate Law Departments
February	7	Meeting of Section on Trade Regulation Dinner Meeting of Committee on Trade Regulation Meeting of Committee on State Legislation
February	8	Dinner Meeting of Executive Committee
February	13	Dinner Meeting of Special Committee on Housing and Urban Development
February	14	Dinner Meeting of Committee on Courts of Superior Jurisdiction Meeting of Committee on State Legislation Dinner Meeting of Committee on Insurance Law Dinner Meeting of Special Committee on Banking

February 15 Meeting of Committee on Admissions
Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Legal Aid
Meeting of Committee on Foreign Law
Meeting of Committee on Municipal Affairs

February 20 Dinner Meeting of Committee on Medical Jurisprudence
Dinner Meeting of Committee on the Bill of Rights
Dinner Meeting of Committee on Copyright

February 21 Meeting of Committee on Arbitration
Meeting of Committee on State Legislation
Dinner Meeting of Committee on Aeronautics
Dinner Meeting of Committee on Administrative Law
Dinner Meeting of Committee on Trade Marks and Unfair Competition

February 23 Dinner Meeting of Committee on Municipal Affairs

February 27 Dinner Meeting of Committee on Family Law
Meeting of Library Committee

February 28 Meeting of Committee on State Legislation
Meeting of Committee on Domestic Relations Court

Some Reflections on Advocacy

By THE RT. HON. LORD BIRKETT

I must just take a very few moments to acknowledge the very great honor I feel it to be to be invited to speak before this Association. If anything could intensify my pride and my pleasure, it is, of course, that far, far too generous introduction to which you have been good enough to listen.

I remember a friend of mine telling me—with what truth I know not, but he told it to me—that in the Virginia countryside one day when he was walking there he saw one of the little churches, and outside it was a notice in big print which said, "Annual Strawberry Festival," but when you got quite close, in quite small print were the words, "Owing to the Depression, prunes will be served."

I sometimes feel it is very difficult to recognize one's self in the recital of so many virtues of which one was quite unaware! The danger is: that the audience will expect strawberries, whereas I can only produce prunes.

At any rate, I must without any qualification express to you the immense pride and the immense satisfaction it is to be here, to be received here with that splendid welcome the President has been kind enough to extend in such full measure.

And as to the election to Honorary Membership, why, life is still full of surprises. My sweet wife is in the audience and she will have to forgive me betraying a confidence; but one day when a certain honor appeared in the London papers, some friend of mine wrote and said, "This honor will rest gracefully upon your shoulders." My sweet wife said, "If you will straighten them a little bit, it will be a damned sight more graceful."

And the surprise and the pleasure in this—I very well remem-

Editor's Note: The lecture published here was delivered by Lord Birkett at a meeting of the Association held on November 15, 1960. At the meeting Lord Birkett was made an Honorary Member of the Association. The President's remarks on this occasion will be found in the Activities Section of this number of THE RECORD.

ber making a speech in Washington at the Joint Meeting of the Canadian Bar and the American Bar, and I thought that I was making the last speech I should make on American soil. I still remember the emotion with which I cited the great words from Julius Caesar, when Brutus and Cassius, you may remember, were taking their final farewell, and I used the words, "If we shall meet again, why, we shall smile; if not, this parting were well made."

Well, I am here to smile again, and amongst many of the very kind friends who have come here to honor me tonight, I am sure you will forgive me if I say that I feel particularly honored by the reigning President of The American Bar Association and his wife and also my very very dear friend Mrs. Olive Ricker.

Nobody knows except the members of the Bar Association all that Olive Ricker has done for that great body, and it gives me extreme pleasure to think that she has been good enough to come all the way from Baltimore just to renew our old and treasured friendship.

So let me discharge my first great obligation before I say a few words about my chosen topic by saying that I shall remember all my days the kindness, sir, of your introduction, and the very generous welcome you have been good enough to shower upon me.

Now, sir, the subject on which I propose to speak for quite a short time is "Some Reflections Upon Advocacy," and I should like to make it plain at once that I do not propose tonight to speak about the rôle of the advocate.

As you know, both in ancient times and in modern times the true position of the advocate in our society has very rarely been understood and from time to time has been much abused and I am not going to spend time tonight justifying as I very easily could the position of the advocate.

Some of you may remember the terrible words that Dean Swift used in "Gulliver's Travels" about the advocate, that "he was a man who could make black white and white black according as he was paid." Well, Congreve in "The Way of the World" once said, "Hell knows no fury like a woman scorned." But I think he forgot the disappointed litigant.

And that certainly was what Swift was; because if you read further into "Gulliver's Travels," he tells about the disappointments he had had in his struggles in the law.

I say I am not going to deal with that part of the advocate's life tonight. A great man, one of the greatest advocates that has ever stepped in the English courts, the great Erskine, when he defended Tom Paine on the charge of publishing a seditious libel when he published "The Right of Man," stated the position of the advocate in words that can never be bettered. And great men like Dr. Johnson have made it quite plain that the position of the advocate in the world at large and in the world of law is one of the highest and the most honorable to which men and women can aspire.

No; I want to speak about some of the aspects of advocacy which have appealed to me, and the first thing I want to say is this:

In ancient days—certainly during the time of Cicero and Quintilian, the orator—that was the word; not the "advocate"—it was the orator. Where we get our word "orator" is from the Roman designation of the advocate. It was the orator that was the great man. He ranked beyond politicians, statesmen, or even soldiers. And the highest ideal to which the Roman citizen could aspire was to be an orator.

And Quintilian, writing some time after the days of Cicero, said, "I reserve the name of orator for the truly good man, a truly honorable man."

I suppose a proper definition of advocacy might be this: *The art of persuasion*. And it is a mistake for us to suppose that advocacy is confined to the courts of law.

Every day the arts of advocacy are being employed—either in the Senate, the Congress, the House of Commons, the House of Lords, the newspapers, the radio, the television—everywhere people are trying to persuade other people to some desired end.

Of course, the greatest example of pure advocacy, I think, was this: When Marc Antony spoke over the dead body of Caesar, he said, if you will remember: "I come not, friends, to steal away your hearts"—though that was the real reason why he had come—

but he began with the ancient and rhetorical trick which is followed by a great many people even today—

> "I come not, friends, to steal away your hearts. I am no orator as Brutus is, but, as you all do know me, a plain blunt man that loves my friend; and that they know full well that gave me public leave to speak of him. For I have neither wit, nor words, nor worth, action, nor utterance, nor the power of speech, to stir men's blood. I only speak right on; I tell you that which you yourselves do know, show you sweet Caesar's wounds, poor poor dumb mouths, and bid them speak for me. But were I Brutus, and Brutus, Antony, there were an Antony would ruffle up your spirits, and put a tongue in every wound of Caesar, that should move the stones of Rome to rise and mutiny."

Now, that is advocacy.

And it was done in the familiar way by disarming opposition, but with superb skill. "I come not, friends, to steal away your hearts." Though his manifest purpose was to do that very thing he so marvelously achieved.

Now, that is advocacy and, if I may be allowed to say so, my experience in the English courts has been that there are certain men who have the same innate gift possessed by Marc Antony.

For example, take Erskine about whom I spoke a moment ago. It is the one of the remarkable things in all the history of law that happened when Erskine had just been called to the bar. He never had had a case; he never had had a brief; and yet was briefed for his very first case to defend a certain Captain Baillie against the Lords of the Admiralty, and he came right at the end after a long string of advocates and he made a speech that day, his first, and Lord Campbell,who wrote "The Lives of the Lord Chancellors —because Erskine ultimately became Lord Chancellor—Lord Campbell said of that first speech of Erskine, "Every eye was fixed upon the advocate; breathing was suspended, and if a flake of snow had fallen, it would have been heard to fall." The first speech the man ever made—the advocate born, not made.

When young Somers rose in Westminister Hall at the great trial of the seven Bishops, nobody had heard his name. He, too, came at the end of a long string of advocates, and he spoke for a mere ten minutes. Yet in the great phrase of Macaulay, "He broke the rod of the oppressor" and when he sat down, his fame was established forever.

And so there are certain elements of advocacy that cannot be taught. They are innate. And there are many advocates who have a practice of their own, an idiosyncrasy, if you like, of their own; and nobody can be obliged to conform to any one pattern.

I used to admire, more than I can say, your great John W. Davis, but it's no good saying, "There is the pattern." Because a great advocate like Davis can't be imitated.

Lord Rosebery wrote the life of one of the greatest orators England ever produced, Lord Chatham, and Greville, the diarist, said of the oratory of Chatham that it was beyond belief to realise the power that he could exert over any audience that he ever addressed. And yet when Lord Rosebery came to analyze the oratory of Chatham, he said,

> "Assiduous study of words, constant exercise in choice language, so that it was habitual to him even in conversation, and could not be other than elegant in pre-meditated speech; this, combined with poetical imagination, passion, a mordant wit and great dramatic skill, would probably seem to be the secret of Chatham's oratorical supremacy . . . And yet it is safe to predict that a clever fellow who had mastered all this would produce but a pale reflection of the original. It is not merely the thing that is said but the man who says it that counts, the character which breathes through the sentences."

And so I think that each advocate must be himself. I was fortunate enough to spend some years in the chambers of the great criminal advocate, Marshall Hall—Sir Edward Marshall Hall.

He had his great days, when he carried everything before him

with a perfect torrent of eloquence, and he had his bad days, too —like most people.

But I remember sitting behind Marshall Hall in a murder case when I was quite a young man at the bar, when Marshall Hall was getting to the end of his career, and to a country jury, mark you, in a murder case, he was trying to impress upon them how irrevocable their verdict would be.

"You speak the word of life, or you speak the word of death, and there is no power in this world that can overcome your verdict."

And then he said,

> "Put out the light, and then put out the light. If I quench thee, thou flaming minister, I can again thy former light restore, should I repent me; but once put out thy light, thou cunning'st pattern of excelling nature, I know not where is that Promethean heat that can thy light relume."

The great words from Othello—and I don't believe that country jury understood one word of it.

But this was certain—that what he intended to convey, the irrevocability of the verdict—that was made plain enough. But the rhetoric of the language couldn't have been employed by any other advocate that I know at the English bar, but Marshall Hall could carry it off.

And it is another very good illustration of what I have been trying to say: That in my opinion each advocate has some quality of his own and he would be wise not to try and imitate other people, but to be himself.

We have a book—I don't know whether it is in your library or not; it ought to be—a book called *Pie Powder*.

It is a book of legal reminiscences written by a man who wrote it originally under the name of "A Circuit Tramp," and he was the leader of the Western Circuit, a man called Alderson Foote, King's Counsel. And in the course of the book he reviews most of the advocates that he had been in contact with during the

whole of a busy life, and one in particular, Sir John Holker, who was Solicitor General and afterwards Attorney General; he says his delivery was so painful that it was a terrible effort to listen to him at all, and yet he had a practice that was worth thousands and thousands a year. His halting delivery somehow made the jury say, "I feel sorry for that man; we will give him the verdict."

But in *Pie Powder* all the qualities of the various advocates are set out and well repay careful study.

Lord Broughham, was, as you know, a most remarkable man—not merely a remarkable lawyer, a remarkable statesman. The opponent who was against him on almost every occasion on circuit was a man called Scarlett, who afterwards became Lord Abinger, and there they were pitted against each other pretty well all the year round. One of the Judges once had the opportunity of talking with a juryman who had been taking part in the trial and the Judge said to the juryman, "Well, what did you think of the advocates that appeared before you?"

"Oh," said the man, "Brougham was the great man." "But," the Judge said, "you gave the verdict every time to Scarlett." "Ah," he said, "but Scarlett was always on the right side."

That was a wonderful testimony to the persuasive advocacy of Scarlett, unmatched, I should imagine, until Sir Edward Clarke of our bar, who was supposed to be the most persuasive advocate that ever stepped, and so let me leave this topic with just this reflection:

I am satisfied from a fairly long experience that the advocate who desires to excel can watch the great men, profit from the example of the great men; but he must at all costs be himself—*be himself.*

Now, the second thing I wanted to say, is this: I think your advocate must have lots of qualities, and I will refer to one or two of them in a moment—but I think above all other things he must have a love of the spoken word.

Now, I don't know, I am sure, how it comes about that people begin to love the practice of the spoken word. I have heard in my time now, I suppose, most of the great men, the forensic orators,

certainly—men like Lord Buckmaster in the House of Lords; men like Asquith in the House of Commons. And on the platform I heard Mr. Lloyd George, Mr. F. E. Smith, afterwards Lord Birkenhead, and all the great speakers of my time—and they are all men with one thing in common—they all loved the spoken word. And it is essential I think that your advocate must have as one of his qualities a love of the spoken word.

In this connection I think of Abraham Lincoln. I often look at his statue, which is in Parliament Square in London as you know. Every time I go to the House of Lords, I pass it and I look up at that brooding figure of Lincoln, so appropriately set in that square looking to the House of Commons and the House of Lords and Westminister Abbey, and I reflect that there was a man who made the greatest short speech in the history of the English tongue: the speech at Gettysburg. Ten sentences spoken in two minutes, following upon the oratory of Mr. Everett, which had taken nearly two hours. But the speech of the President will go down to history, and as I say, will live so long as language endures.

What is the secret of it? The love of the spoken word. Because, you know, most people think—I don't suppose they do here in this country—but most people in my own country think that that speech of the President was a speech inspired by the emotions of the solemn occasion and made without preparation.

In that connection, let me say that one of the brightest observations ever made by Lord Hewart, the Lord Chief Justice, was that extempore speeches aren't worth the paper they are written on.

Most people believe that that speech at Gettysburg was an extempore utterance of the President, but it really wasn't. You have probably seen in the Library of Congress the drafts that he made, and the only alteration in the speech as it was delivered from the drafts which are to be seen in the Library of Congress was that Lincoln, when he spoke at Gettysburg, added two words —two words only—and those were, "This nation *under God* shall have a new birth of freedom" and so on. He interpolated the words "under God."

How a love of the spoken word is to be acquired, I cannot say with any certainty. But I think there is one method which was operative in my own case and I would like to say a word or two about that.

I believe that the lawyer who desires to be an advocate in the full sense of that term, must have a knowledge of words, their meaning, their color, their use by the great masters, their associations; so that the right choice of words is employed by the advocate.

Now, it is not new learning; it is centuries old. Caesar it was who proclaimed that the right choice of words was the very fountainhead of eloquence. Quintilian never tired of telling his pupils, "Select your words." And Dean Swift, who said such bitter things about the lawyers, said in a very great address, "Proper words in proper places make the true definition of a style."

And your advocate seeking after style must in some way get the right choice of words. Just let me say this further sentence about words.

You see, the lawyers have often been blamed for using what is called the "jargon of the law." It is a very inaccurate phrase, in any event. But that is what they are accused of doing.

Well, of course, you know as well as I know—probably better than I know—that there is a certain kind of language that is employed when you are dealing with documents where it is necessary to be exact, where you want, above all things, to get precision of statement.

When you are free from that and you can use words that have an emotive quality, why, then the lawyer has made a very great contribution to language.

I brought with me tonight and I will, with your permission, read it so that I make no mistake about it, an example of what I think is perfection in the choice of words, and it goes back to 1626 when Chief Justice Crewe delivered a judgment when the Judges had been called in to advise the House of Lords, as they sometimes are, where the claim was to a peerage where the Lord Oxford of that day had died without issue—that was the point.

This is a passage and only a passage from the judgment of the Chief Justice:

> "This great honor, this high and noble dignity, hath continued ever since in the remarkable surname of de Vere. I have labored to make a covenant with myself that affection may not press upon judgment, for I suppose there is no man that hath any apprehension of gentry or nobleness but his affection stands to the continuance of so noble a house, of so noble a name, and would take hold of a twig, or a twine thread to oppose it. And yet, time hath its revolutions. There must be a period and an end to all things Tyrean, and why not of de Vere. For where is Broat, and where is Mowbray; where is Mortimer? Nay, which is more, and most of all, where is Plantagenet? They are entombed in the urns and sepulchres of mortality and yet, let the name and dignity of de Vere stand so long as a paean of God."

I very much wish the judgments delivered in our day could come anywhere near that. I would go a long way to hear them.

But there, recorded for all time, is that judgment and exemplifying, as I think it does, in the most perfect way the point I am making of the right choice of words.

Now, I could spend a good deal more time on this topic but I must remember the virtues of brevity. Shakespeare the great master of words is a temptation.

The *uncertain* glory of an April day. Just think of the use of that word, "*uncertain!*" The uncertain glory of an April day.

Then, the lovely thing you may remember: "For aught that I could ever hear or read, the course of true love never did run smooth, for either there was a difference in blood"—and then he goes on to the end, if you will remember, to say, "That ere a man can say 'behold,' the jaws of darkness do devour it up so quick *bright* things come to confusion." The wonderful use of the word "*bright.*"

Take "dust"—the simple word "dust"—"Golden lads and girls all must like chimney sweepers come to *dust.*"

And I have said enough, I hope, to make it quite plain that, in my experience and in my opinion, the advocate must beyond all things have a love of the spoken word and the first element must be that he has acquired the quality of selecting the right words for the occasion.

And just let me add to it this: There is something more. There must not merely be the right choice of words; the words must be in the right order.

Now, it is a miracle that the order of the words can produce the effect that they do.

"The vision and the faculty divine." Why, they open a window on the infinite. "The vision and the faculty divine." But when you say "The vision and the divine faculty" all the wonder of the words is gone.

And if you take one of the loveliest things in all the world, the 23rd Psalm, "The Lord is my Shepherd, I shall not want," and then you think of the great men who have tried to put it into different order, like Milton, and Herbert and many of the great divines; and they have all failed.

The right words in the right order.

Now, Mr. President, I must not detain this very kind audience too long, but there are just one or two more matters that I would like to speak about if I don't weary you before I sit down, and the first one is this:

I am not going to speak tonight at all about what I would call the technicalities of the advocate, about the way to examine in chief, as we call it, or to cross examine or to re-examine. These are very highly technical matters and they want a great deal of attention.

The advocate in England that I was most frequently opposed to was my dear late friend, Sir Patrick Hastings. Now, his supreme quality was the power of cross examination. Whenever I was against him and after my client had given evidence in the box, I had to sit down and listen to him being torn to pieces by Patrick

Hastings. And you know it is a very, very great education to learn how to sit still. And not continually be upon your feet.

I remember a very trying case when an American subject, I am sorry to say, was suing in our courts Lloyd's Underwriters for the loss of his ship which had been burned, and he was suing for the insurance money and Lloyd's had pleaded fraud, "You burned it yourself."

So when I saw this gentleman, I said, "Now, look here, Lloyd's Underwriters don't plead like this, you know, unless they've got some evidence. You had better tell me the truth."

And he said, "All the allegations are untrue. You may safely go ahead." We did. I confess I opened the case rather delicately. And then there came this awful moment of cross examination and the first kind of question was this: "Mr. so and so, do you know the ship called ABRAHAM T. WELSER?" First, of course, there was hesitation but ultimately this came out: "What happened to her?" "She was burned." What about the insurance money?

Ultimately after long questioning he admitted that he had it. Well, he went through about six ships like this while I sat—with the sweat pouring from underneath my wig. And I always remember the way counsel finished—and I knew perfectly well what he was doing.

My client having, I very much regret to say—having lied at intervals pretty acutely—and the final question before the jury, mark you, was this:

"You are an American subject?" "Yes." "And you came over to this country for this trial?" "Yes." "What ship did you come on?" And the answer as expected was, "The GEORGE WASHINGTON."

As I say, I am not going to touch tonight on those technicalities, because there are two much more important things that I want to say. I've got my own views as to what I like about the advocate.

I like the man who stands up straight; doesn't walk about, but just stands up and keeps his eye on the judge and if there is a jury keeps his eye on the jury.

He doesn't let anything interfere between that immediate contact between either the Judge or, if the case is a jury case, with the jury. I like that.

I like the man who speaks so that he can be heard—and it is an extraordinary thing if you go into some of the highest courts in the land—take the Privy Council where I sometimes sit, the Judicial Committee of the Privy Council or the Appellate Committee of the House of Lords—upon my word, it is sometimes very, very difficult to hear the man who is only four or five yards away from you.

Of course, they always say it is because the Judges are getting old, but it isn't that.

I like the advocate who speaks up so that he can be heard. I like the advocate who uses good English, who selects his words and becomes more effective because of that.

I like the advocate who is courteous; but is resolute.

And I like the advocate who is not a sycophant, who will stand up before the Court. And I've got all sorts of little ideas of my own about what I think the advocate should do. I don't like to see the advocate pick up a glass of water and hold it in his hand as though he were going to drink your health—quite a habit in some of our courts. For all those things I say are the trappings of advocacy; and I think myself that the advocate, of course, must be a man of law. It is essential that he should know his facts perfectly and it is essential that he should know his law perfectly.

But my belief has been and is that your advocate to reach the heights must be more than a man of law. He must be in some degree a man of letters.

Now, I don't know whether Sir Walter Scott is popular in this country to this day or not, but in "Guy Mannering," Scott drew the picture of a great counsel, Mr. Counselor Pleydell. Scott records the great scene where Pleydell took Col. Mannering, his client, into his chambers in the High Street in Edinburgh, and showed him a great collection of the English classics, the great books of our time, and Pleydell said to Mannering, "These are my tools of trade."

"A lawyer without history or without literature is a mere

mechanic; but with these he may become a great architect." And I daresay everybody in this room would agree with me about this —that from reading there comes the enlargement of almost every faculty.

Taste is sharpened and deepened. The imagination is assisted and helped. And even though the reading may be of a very limited kind, if a man knows the Authorized Version of King James' Bible or the great plays of Shakespeare, why, he knows something about what language can do and knows how language can be employed.

Some of the greatest things that were ever said in any language were said by Shakespeare when he was saying farewell to his great career in The Tempest, when he touched the very highest levels of human speech.

> "Our revels now are ended; these our Actors, as I foretold you, were all spirits and are melted into air, into thin air. And, like the baseless fabric of this vision, the cloud-capp'd towers, the gorgeous palaces, the solemn temples, the great globe itself, yea, all which it inherit, shall dissolve and, like this insubstantial pageant faded, leave not a rack behind. We are such stuff as dreams are made on, and our little life is rounded with a sleep."

Now, the lawyer who knows language of that kind, in my judgment, is much better fitted to deal with all the multifarious and multitudinous problems with which the lawyer has from time to time to deal, and therefore I would urge that a lawyer should be a man of law, essentially, but also a man of letters.

And let me end, Mr. President, with this: That whatever the qualities of the advocate may be, be they ever so dazzling, unless there is character and integrity, then the career will be ultimately a failure.

The law demands that the highest standards of conduct should be faithfully pursued. And I cannot tell you how much I admire, Mr. President, that selection in your Annual Report of your

Standards of Professional Ethics, your independence of the judge, the fearlessness of your advocate, the standards of honor which you have set before yourselves, and, after all, one of the greatest pleasures of coming to an Association of this kind is to remember your great traditions.

Not very long in the future you will be celebrating your Centenary, and you will recall then, as you recall tonight, that the reason this great Association in New York came into being was to uphold the dignity of the profession of the law, to cleanse it from the evils which at that time were beginning to cluster around it.

And it is a great thing to think that from generation to generation the tradition has been handed down and will still be handed on.

And it may be, ladies and gentlemen, it may be that people will deride the lawyer as they have done in ages past, but, as John W. Davis said in that noble address, "Nobody can degrade the profession except the members of it by failing to maintain the highest standards."

And I like to think that the great men of the past—I would like to think, for example, of James Russell Lowell speaking of the effect and influence of a man like Emerson, and it can be applied to all the great advocates:

> "Was never eye did see that face;
> was never ear did hear that tongue;
> was never mind did mind that grace,
> that ever found the travail long,
> but the ears and eyes and every thought
> were with his sweet perfections caught."

Let me end, Mr. President, and ladies and gentlemen, by renewing my thanks to you all for the opportunity of speaking here today; of the pride it is to me to think that for the rest of my days I shall be an Honorary Member of your great Association, and allow me to wish you and all of you in all your doings the utmost and highest possible success.

Soviet Law and East-West Trade

Report of a Meeting Sponsored by the Committee on Foreign Law on April 27, 1960

INTRODUCTION

In its tradition of exploring and publicizing problems of foreign law for the members of the Association, the Committee on Foreign Law arranged a meeting devoted to the law of the Soviet Union as it relates to trade between Communist and non-Communist countries. It was the hope of the Committee that a basic and practical discussion of the subject would benefit American lawyers who have not yet, but who might in years to come, encounter problems of dealing with the Soviet legal system. The Committee was fortunate in obtaining Professor Harold J. Berman of the Harvard Law School as the principal speaker at the meeting and was equally fortunate in obtaining as members of a discussion panel Professor Leon S. Lipson of the Yale Law School and Isaac Shapiro, Esq., a member of the Committee on Foreign Law. Professor Lipson and Mr. Shapiro also delivered brief remarks of their own in the course of the meeting.

In order to provide a wider circulation of the remarks of the speakers, they have been reduced to writing and reprinted below. They are supplemented by a bibliography prepared by the Librarian* of the Association in cooperation with the Committee on Foreign Law.

Printed below are the following:

1. "Legal Aspects of Soviet Foreign Trade," by Harold J. Berman.
2. "Legal Aspects of Soviet Foreign Trade: Comments," by Leon S. Lipson.

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* For the preparation of the bibliography (p. 63) the Committee is indebted to Mr. Arthur A. Charpentier, Librarian; Mr. Joseph L. Andrews, Reference Librarian; and Mr. Anthony P. Grech, Assistant Reference Librarian.

3. "Seeking Local Counsel in the Soviet Union," by Isaac Shapiro.

4. Selected List of English Materials on Soviet and European Law. See Page 63.

LEGAL ASPECTS OF SOVIET FOREIGN TRADE

By HAROLD J. BERMAN

In approaching the legal aspects of trade with the Soviet Union, one should keep in mind, I believe, three main points:

First, Soviet commercial and legal institutions have been very skillfully adapted to the normal and traditional requirements of international trade.

Second, Soviet foreign trade is, at the same time, part of the Soviet planned economy and is designed to serve the interest of Soviet foreign policy.

Third, Western governments and Western businessmen (and their lawyers) must accept this dualism in the Soviet foreign trade system; but also they should exert as much pressure as possible to induce the Soviet leadership to maximize what I have referred to as the normal and traditional element in the Soviet foreign trade system, its adaptation to world market institutions, and to minimize those elements which, in serving the economic and political interests of the Soviet state, disrupt world market institutions.

1. In speaking first of the adaptation of Soviet commercial and legal institutions to the requirements of international trade, I should like to give four examples.

(a) *Currency and prices.*—It is significant that the Soviet trading organizations use only foreign currencies in their dealings with other countries. The ruble is a purely internal currency, used in foreign trade only for accounting purposes. Also Soviet prices in world markets are based on world market prices. Indeed, it is extremely difficult for a planned economy to measure com-

parative advantage, and even trade among the Communist countries themselves is calculated on the basis of world market prices. (I once asked an important official of the Czech Ministry of Foreign Trade, "How will you know what prices to charge in foreign trade when the whole world is Communist and there are no more 'world market prices'?" He replied, "We used to discuss that question, but we decided there is no use worrying because it will never happen.")

(b) *Contracts.*—Soviet contract practices and techniques of trade are very similar to those that have been developed throughout the world. CIF, FOB, and similar types of contracts, bills of exchange, letters of credit, marine insurance policies, bills of lading, and other commercial instruments, are governed by virtually the same rules in Soviet foreign trade law as in Western legal systems. Here there is a considerable disparity between Soviet practice in foreign trade and in domestic trade; in Soviet domestic trade many of the devices used in foreign trade are almost unknown. It is perhaps the Soviet dependence, in foreign trade, upon commercial-legal instruments which are transplanted from another climate, so to speak, that accounts for Soviet conservatism in this field. In 1955 I had the opportunity of talking for several hours with the chief legal advisor of the Soviet Ministry of Foreign Trade, Mr. Bakhtov, and five of his associates. I put cases to them involving changes in customary norms, such as the use of the received-for-shipment bill of lading (instead of the "on board" bill), the use of marine insurance certificates instead of policies, the reliance upon a bank indemnity to supplant a missing part of a set of bills of lading, and similar developments in commercial custom which have been recognized by our courts. In each case, the Soviet lawyers took a very conservative position, refusing to admit the binding force of a custom which departed from traditional legal norms. Their position was that any deviation from legal definitions must be clearly expressed in the contract. Indeed, persons dealing with Soviet officialdom soon learn that, generally speaking, "if it isn't in writing it doesn't exist."

(c) *Legal responsibility of trade organizations.*—Where all foreign trade is a "monopoly" of the State, a serious problem arises of the legal responsibility of the State for obligations incurred by the various state trading agencies. The foreign firm trading with Soviet state agencies will be insecure if its legal rights can be defeated by a plea of sovereign immunity. On the other hand, the Soviet State will be unhappy if it itself is liable for debts incurred by individual trading agencies. The Soviet solution to this problem has been to create independent foreign trade corporations, called "combines" *(ob'edineniia),* which have legal personality and are not "state organs" in the technical sense of that phrase under Soviet law—that is, are not organs of state administration but operative units operating on the basis of economic accountability *(khozraschet).* Being legally independent, the foreign trade combines cannot plead sovereign immunity but by the same token the State treasury as such is not liable for their debts.

One consequence of this arrangement is that the foreign trade combines may take advantage of the orders of the Ministry of Foreign Trade, under whose administration they operate. In the dispute over the termination of Soviet oil deliveries to Israel after the Suez crisis of 1956, which was arbitrated in Moscow in 1958, the Israeli importer argued that the Soviet oil export combine, Soiuzneftexport, should not be excused from its obligations because of the denial of an export license by the Ministry of Foreign Trade, since the relations between the combine and the Ministry are so close that the act of one is, in effect, the act of the other. Without going into all the ramifications of that case, it may confidently be stated that on that point the Israeli argument was very weak, since under Soviet law (and the contract, signed in Moscow, was admittedly governed by Soviet law) the combine is independent of the Ministry. Of course the fact of the matter is that the Ministry controls the combine completely; but to pierce the veil of the combine's legal independence, as the Israeli argument sought to do, would be to create more difficulties than it would solve. As I have already indicated, Soviet foreign trade

combines appear in world markets as legally responsible business entities, acting on the basis of internationally accepted principles of commercial law, subject to suit in court and capable of making enforceable agreements to arbitrate disputes in Moscow and elsewhere. They could not easily do this if they were treated in law as branches of state administration—although that is in fact what they are!

If we accept the legal independence of the Soviet foreign trade combine, how are we to avoid the problem which the Soviet-Israel oil arbitration poses—that the Soviet combine may easily avoid its obligations under a contract by taking advantage of the power of the Ministry of Foreign Trade to deny or revoke a license? The answer, it seems to me, lies in the contract. In my view, the risk of denial or revocation of an export license should be upon the exporter, and of an import license upon the importer, where the contract is silent upon this question; if I am correct, the decision of the Moscow Foreign Trade Arbitration Tribunal in the Israel case was wrong. (See Berman, "Force Majeure and the Denial of an Export License under Soviet Law: A comment on Jordan Investments Ltd. v. Soiuznefteksport," 73 Harvard Law Rev. 1128 (1960).) But clearly, after that decision, persons dealing with Soviet foreign trade combines must, if they wish protection against a change of mind on the part of the Ministry of Foreign Trade, insist upon a clause expressly allocating the risk of interference by the Ministry upon the Soviet party. I understand, however, that Amtorg has recently drafted general conditions for its contracts which contain an express provision to the opposite effect: that the contract is subject to the granting of a license by the Soviet Government. (In the Israel case, the contract did not mention licenses but contained a general "force majeure" clause which listed various contingencies which would excuse non-performance, with the additional words "due to any other cause of whatever nature beyond the control of the defaulting parties.")

(d) *The Soviet Foreign Trade Arbitration Commission.*—

Finally, in illustrating the adaptation of Soviet commercial and legal institutions to the requirements of the traditional world-wide system of international trade, I should like to mention briefly the Foreign Trade Arbitration Commission of the All-Union Chamber of Commerce of the U.S.S.R. Despite the adverse opinion in the world press concerning the Israel case, the reputation of the Soviet tribunal is in general very high among traders in most countries. Actually, many non-Soviet courts would have reached the same result in the Israel case that the Soviet tribunal reached. Apart from that case, at any rate, the record of the Commission testifies to its attempt to achieve a reputation for impartiality and objectivity; without such a reputation it could hardly hope to survive, for its jurisdiction depends upon the voluntary submission of the parties, and while Soviet foreign trade combines will normally ask for a clause submitting disputes to arbitration in Moscow, they will often accept arbitration elsewhere if the other party insists. In fact the Soviet Foreign Trade Arbitration Commission has, since its establishment in 1932, shown a thorough familiarity with the commercial law and commercial custom of many countries. Its fifteen-member panel of arbitrators are, for the most part, prominent Soviet professors of law or economics who are experts in international trade. Its procedure is fair. It gives reasoned opinions in connection with its awards. It has decided many cases in favor of the non-Soviet party.

Nevertheless, the informal connections between the All-Union Chamber of Commerce (to which the Commission is attached) and the Ministry of Foreign Trade—connections which are implicit in the very existence of the "State monopoly of foreign trade" of which Soviet literature boasts—suggest that it is an inappropriate tribunal for the decision of cases in which a political element is likely to be involved.

2. This leads to a consideration of the second point which I made at the outset of my talk, that Soviet foreign trade is part of the Soviet planned economy and is designed to serve the inter-

ests of Soviet foreign policy. This means that it is totally state-operated and that it is conceived solely as a means of serving state interests, both economic and political.

Many legal problems arise from the fact that Soviet foreign trade is a "monopoly" of the Soviet State, and I shall give only a few examples. It is important to note at the outset, however, an underlying problem, which is not "legal" in the narrow sense—namely, the absence of reciprocity in the relations between a private Western trading firm and a Soviet state trading organization. In commercial contracts between private firms generally, each party gives up something to the other in the expectation of being better off himself as a result. The reciprocal exchange of sacrifices makes them both wealthier. But in the case of contracts between a capitalist trader and a Soviet foreign trade combine, the kinds of advantages achieved are different for the two parties to the transaction. The Soviet foreign trade combine considers itself better off only if the transaction is of benefit to the Soviet State, whereas the capitalist considers himself better off if he has made a profit, whether or not his government has gained any net economic or political or strategic advantage.

The fact that the Soviet Union is, in effect, a single business organization, a "company" which employs over 200 million people and grosses over 200 billion dollars a year, whose purchases and sales abroad amount to over eight billion dollars annually, leads to many complications for foreign firms with which it conducts trade. In the first place, even apart from the political factor, such an organization tends to plan its exports and imports in quantitative terms, seeking large-scale exchanges of goods with other big units, preferably governments; there is, in other words, an inherent tendency for a planned economy of the Soviet type to conduct foreign trade primarily on the basis of bilateral trade agreements which set programs of exchanges of particular goods in particular quantities over a period of years.

Secondly, such a business organization—again, even apart from the political factor—tends to keep many important features of its internal economy secret from its competitors. The contents of

Soviet foreign trade plans, and even the details of the planning process, are not available to businessmen of other countries; indeed, their divulgence by Soviet officials is subject to the law on state secrets and on crimes against the state. It is therefore impossible for a foreign businessman to make the same kind of independent, informed estimate of market developments in the Soviet Union that he can make with respect to non-Communist countries. He cannot get adequate information on Soviet costs of production. He is somewhat in the same position vis-a-vis the Soviet Union as a whole that he would be in vis-a-vis a large private monopoly.

One special legal problem which arises from this situation is the insecurity of protection of foreign patents within the Soviet Union. If one sells machinery, or chemicals, which embody processes on which there are patents in this country, for example, what can one do to protect the secrecy of those processes? What is to prevent Soviet manufacturers from copying them? The possibility of taking out patents or certificates of authorship within the Soviet Union has not been sufficiently utilized, in my opinion, by non-Soviet firms; at the very least, such patents or certificates of authorship would protect the holder against business competitors from other non-Soviet countries who export to the Soviet Union, and I believe they would provide a basis for protesting any use by Soviet producers without proper payment of royalties or other compensation. What is done by many Western firms in this connection is, however, often more satisfactory for them in the short run: they seek to obtain from the Soviet purchaser a lump-sum payment in advance of the value of future royalties.

One other legal problem which I shall mention is that of Soviet dumping. Here we are plagued by inadequate definitions of what dumping is. Usually dumping is defined in terms of the value of the exported goods in the home market and of their cost of production, and under that definition it is extremely difficult to show that the Soviet Union ever engages in dumping. Indeed, it is probably impossible for the Soviet economists themselves to determine the relation of their export prices to internal prices

and to costs of production. If, on the other hand, dumping is defined in terms of sales substantially below world market prices, the Soviets have, indeed, offended on occasion, but not nearly so often as has been alleged and probably no more often than United States firms. I believe that it is rare for the Soviet Union to sacrifice her long-range economic objectives for short-term political gains. Usually she gets what she can for her goods, and often where her sales are at low prices that is because no one will pay more. I do not offer these remarks as a complete answer to the problem of Soviet dumping; on the contrary, they are offered only to show some of the complexities involved in any attempt to solve that problem.

3. This leads to my third point, that we must accept the dual character of Soviet foreign trade, the fact that it is conducted along normal commercial lines in some respects and along quite abnormal political and state-economic lines in other respects, and that we must exert as much pressure as possible to get the Soviet leaders to maximize normal commercial trade and to minimize the disruptive influence of restrictions and discriminations which stem from the Soviet system of economics and politics.

How are we to do this? Not, I suggest, by running away from East-West trade, and not by insisting that the Soviet Union conduct its trade on the basis of the principles of free multilateral trade embodied in the General Agreement on Tariffs and Trade. To ask the Soviet Union to trade on the basis of the same principles upon which American trade is carried on is to ask the Soviet Union to abandon its planned economy and its state monopoly of foreign trade.

The proper course for the United States, I believe, is to enter into a bilateral agreement with the Soviet Union of the kind which Mr. Khrushchev proposed to Mr. Eisenhower in June 1958, in which each government would authorize the exchange of particular goods in particular quantities over a particular period of time. It is this type of agreement which the Soviet Union (like other Communist countries) has entered into with France, England, Sweden, and a host of other countries. Through such an

agreement we could ensure that our trade with the Soviet Union, whether large or small, is to the advantage of the nation as a whole and not merely of those particular exporters or importers who are now able to get through the meshes of both Soviet and American controls. Moreover, in the negotiation of such an agreement our government could get commitments from the Soviet Union to reduce the discriminatory and restrictive practices which it now engages in. I have discussed this question in some detail in an article published in 1959 in 24 *Law and Contemporary Problems* at page 482.

I would like also to suggest that we should work for a General Agreement on Trade which would include both the Communist and the non-Communist countries, and which would establish a set of international rules whereby Communist countries could be induced to expand that portion of their trade which is conducted on the basis of comparative advantage and to reduce those discriminatory and restrictive trade practices which are ultimately harmful to their own economies. This is not the place to outline the details of such an Agreement, but I may suggest that it should be directed in part toward getting commitments on the part of the Communist countries to increase their exports and to diversify their imports.

The alternative is to make feeble complaints from time to time about Soviet malpractices, and then to combat them by constructing malpractices of our own. We are capable, I believe, of more ingenuity and more wisdom.

LEGAL ASPECTS OF SOVIET FOREIGN TRADE: COMMENTS

By LEON S. LIPSON

Professor Berman's remarks have indicated clearly what he calls "the dual character of Soviet foreign trade." With some qualifications, to be noted, I concur in his analysis, but for rea-

sons to which he does not have an opportunity to refer I find it hard to set much store by the solution that he proposes.

The use of concepts similar to those current in non-Soviet legal systems is a feature of many branches of Soviet law; in this respect Soviet foreign trade law differs only in degree. The technical conservatism with which these concepts are applied by Soviet lawyers and courts can likewise be found in many other branches of Soviet law, including public international law, criminal law, family law, torts, and even some phases of property law. As Professor Berman has shown in other work, the vocabulary and the conceptual apparatus of Soviet law have much in common with continental European models, and their development has been affected by some of the same historical influences.

This description must, however, be overlaid—or perhaps the right metaphor is "undermined"—by recognition of the effect of State and Party policy. It is not so much that some concepts and institutions in Soviet foreign trade are "adapted to the normal and traditional requirements of international trade" while others "serve the interests of Soviet foreign policy"; it is rather, as I think Professor Berman agrees, that Soviet foreign policy deliberately and self-consciously pervades the operations of Soviet foreign trade. Where Soviet commercial and legal institutions have been adapted to customary requirements outside, the purpose has been rather political than economic; where legal procedures and tribunals have conformed to the practices or mores of the world-wide trading community, they have so conformed because it was in the interests of the Soviet State for them to do so. Now there is nothing necessarily sinister in this, and if the results were generally satisfactory the point would not be worth belaboring. The trouble is that in troublesome cases trouble has arisen. The history of the Soviet-Israeli oil arbitration is but one example, though a spectacular one, and can be cited together with the dumping practices of which I think Professor Berman could make more than he does.

It seems to me broadly true that Soviet foreign trade tribunals are inappropriate "for the decision of cases in which a political

arrangement is likely to be involved." That truth does not take us very far. If the Soviet contracting party can insist upon the recognition of Soviet tribunals as the sole competent forum in the event of disputes, the non-Soviet party cannot shift forums to protect himself against the "politicality" of the tribunal on those very occasions when it might matter. As export-license provisos in Soviet-foreign trade contracts presuppose a relationship between business and government that happens not to fit Soviet conditions, so the provision for submission to a Soviet tribunal may presuppose a relationship between the judiciary and the executive that happens not to fit Soviet conditions.

Is the answer to be found in bilateral umbrella agreements between governments? That course seems doubtful. In the first place, I see no evidence for supposing that, if the United States were to "authorize the exchange of particular goods in particular quantities over a particular period of time," we should really "ensure that our trade with the Soviet Union . . . is to the advantage of the nation as a whole." We ought to give the market mechanism a better chance to operate, at least on our side. I would concede that this may require continuous effort to remove restrictions on the United States side when strategic considerations permit, and I should favor such relaxations even though they were not matched on the Soviet side.

In the second place, I think there is some reason to fear that the very success of a pattern of bilateral umbrella agreements between governments would inhibit, rather than promote, "a General Agreement on Trade which would include both the Communist and non-Communist countries."

In a larger perspective, it seems to me that the occasional rigidity and awkwardness of Soviet foreign trade practices follow from more general features of the Soviet system and can be improved only if substantial changes occur in that system. We should not expect to be able to stimulate important reforms in the management of Soviet foreign trade and in the wording of Soviet foreign trade contracts as if the process could be isolated from the general economic and political context. To be sure, particular

improvements in trade relations are one way in which the context itself can be altered. But Soviet-United States relationships are not just a lot of little problems; they are also one big problem.

SEEKING LOCAL COUNSEL IN THE SOVIET UNION

By Isaac Shapiro

The subject of my remarks—seeking local counsel in the Soviet Union—will appear to many of you to be even further removed from professional realities than the topic with which Professors Berman and Lipson have dealt. On the assumption, however, that there are those among you who might be interested in knowing whether there are lawyers in the Soviet Union, and if there are, whether they may be called upon for assistance, I will endeavor to describe our Soviet counterparts and say a word or two as to their availability as local counsel to an American lawyer.

I think perhaps it would be of more than mere academic interest to dwell briefly on the history of the Russian legal profession. This history can broadly be divided into three phases: the period prior to the Judicial Reform of 1864, which gave birth to the pre-revolutionary bar, the period between 1864 and 1917, and the post-revolutionary or Soviet period.

There is not much that can be said about the years which preceded the Judicial Reform—and certainly nothing favorable. It was an era chiefly characterized by a total absence of anything which might properly have been called a legal profession. The calling of representing others in and out of court was open to all but a disqualified few—among them monks and nuns, infants and criminals. Officially, those who performed representational work were known as *stryapchiye,* from the word *stryapat,* meaning both literally and figuratively to "cook up." Colloquially they were referred to as *yabedniki* or slanderers, and at times even viler epithets were used. The popular contempt for these pre-

cursors of the Russian lawyer was more than matched by the hatred with which they were regarded by the Russian tsars, who, especially after the French Revolution, had reason to fear as well as to hate them. It is related that when Peter the Great visited London in 1698 he was taken to Westminster Hall. There he saw people in black gowns and flowing wigs walking busily about. Upon inquiring who they were and being told that they were lawyers, he is said to have exclaimed with astonishment: "Lawyers! Why, I have but two in my whole dominions, and I believe I shall hang one of them the moment I return home."

The Russian lawyer who emerged from the Judicial Reform of 1864 was—to quote a contemporary observer—generated spontaneously, *ex ovo*. In inventing this creature, however, the Russian legislator did have foreign examples to follow, even if there was indeed no domestic prototype. Rejecting both the British and French systems based on dual representation, he created a guild of professional men who were to act as both barristers and solicitors. In this respect the Russians followed the German pattern, although they rejected the German notion of the lawyer as a public official. The period between 1864 and 1917 is generally regarded to have been the Golden Age of the Russian judiciary and bar, a time when the lawyer enjoyed the reputation of being a capable and honest advocate of his clients' interests both against his private adversaries and the State, at a time when the Russian judiciary was also at its apogee.

The final chapter began in 1917 when Decree No. 1 of the Council of People's Commissars of the new Soviet Republic abrogated the lawyers' guild created in 1864. Whether the death of the guild marked the end of the guild system remains, however, to be seen. During the first two decades of the post-revolutionary era, it certainly did seem that the field of legal representation had become once again a free-for-all. A look at the present structure of the Soviet Bar, however, indicates that after forty-odd years of growing pains, the guild system has in many respects been revived, though in a new, Sovietized form. After a long period of direct government control, the Soviet Bar has achieved a measure

of independence which would no doubt have surprised many members of the old guild who, in voting to dissolve the pre-revolutionary bar rather than see it merged into a new group, preferred an "honest death" to a "disgraceful life."

The history of the Soviet Bar has been characterized by its evolution from an essentially bureaucratic institution staffed by non-professionals to its present organizational form, the relatively autonomous "lawyers' *collegium*," a college of professionally trained advocates, controlled only indirectly by the Ministries of Justice of the constituent Soviet republics.

The lawyers' *collegia* are local bar associations whose members (*advokati* or advocates) have a virtual monopoly on practice in the Soviet courts. A separate *collegium* exists in each Region—the basic administrative unit in the Soviet Union—and in each Territory, Autonomous Republic and Union Republic not divided into Regions. In Leningrad and Moscow, the regional and city *collegia* are separately organized. Each *collegium* is governed by a presidium elected by the membership every two years. A finance committee is elected at the same time to supervise the financial affairs of the collegium. The presidium—generally numbering about a dozen—elects a President and two Vice Presidents who perform a variety of executive functions. They are the only members of the presidium who receive remuneration. The presidium exercises jurisdiction over admission to and suspension and expulsion from the *collegium*. A presidium decision refusing admission, decreeing disbarment, or inflicting disciplinary punishment on a lawyer may, however, be appealed to the Minister of Justice of the appropriate Soviet Republic.

Each *collegium* maintains a series of legal consultation offices throughout its territory, presumably distributed in a manner to serve the counselling needs of the community in which they are situated. The presidium determines the location of these offices, subject to the approval of the Ministry of Justice of the appropriate Republic. There are said to be over 5,000 such consultation offices operating in the Soviet Union today. Each consultation office has about 30 lawyers on its staff and is run by a salaried

manager appointed by the presidium from among the *collegium* membership. The manager has one non-legal assistant who serves as combination secretary-treasurer and stenographer.

Now a word or two about the availability of Soviet lawyers to act as local counsel to American lawyers. For this purpose a special college of advocates known as "Injurcollegia," a "subsidiary" of the Moscow College, was created in 1937, and it is responsible for providing litigation counsel for foreigners in the Soviet Union as well as for Soviet citizens abroad. It is to this "Injurcollegia" that you will have to turn if you wish to retain Soviet counsel to represent your client in a Soviet court or—what is perhaps more likely—in a proceeding before either the Foreign Trade Arbitration Commission or the Maritime Commission. In general, Western lawyers who have worked with members of "Injurcollegia" have been satisfied with their performance. Their services are, however, generally limited to assistance in litigation.

Finally, a word should be said of the Soviet notary who finds his counterpart in the French *notaire,* rather than in our own notary public. The Soviet notary is a public official, generally possessing a legal education or experience as a judge or lawyer. In addition to taking oaths and authenticating documents, the notary drafts contracts, wills and other legal documents, and even handles the probate of estates and certain other quasi-judicial matters.

In conclusion, I should caution you that you will probably not find local counsel in the Soviet Union adequately equipped or even willing to assist you or your client in matters not directly related to litigation. As commercial relations between East and West develop, however, it is to be hoped that the Russian lawyer will become a more active participant in East-West business transactions.

Shall We Amend the Fifth Amendment? – A Review*

By C. Dickerman Williams

It is the great virtue of this excellent book that it resumes temperate and scholarly discussion of the Fifth Amendment after a decade clouded by emotion.

According to the Fifth Amendment "no person . . . shall be compelled in any criminal case to be a witness against himself." For over one hundred and fifty years the Amendment was applied primarily, almost exclusively, as a limitation on executive officers engaged in the enforcement of penal laws. The literature on the subject was relatively small, and what there was tended to favor strict construction, if not repeal of the Amendment.[1] Enlightened public opinion was scornful of those who evaded full disclosure by invocation of the Amendment or by other means in the anti-trust, railroad rebate, corruption and other prosecutions and investigations of the era of 1890–1940.

In *Twining* v. *New Jersey,* 211 U.S. 78, decided in 1908, the Supreme Court had sharply downgraded the privilege against self-incrimination, referring to it (at p. 107) as having been regarded at the time of the adoption of the Constitution as a "useful principle" rather than a "fundamental right." In *Palko* v. *Connecticut,* 302 U.S. 319, decided in 1937, the Court had gone out of its way to declare (at p. 326): "Justice, however, would not perish if the accused were subject to orderly inquiry." This language was written by Justice Cardozo, and concurred in by Chief Justice Hughes and Justices Brandeis, Stone, Roberts and Black.

In the period after World War II the Amendment was invoked with great frequency by teachers and intellectuals called before

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* Mayers, L. *Shall We Amend The Fifth Amendment?,* N.Y., Harper and Brothers, 1959, 345 pp.

[1] Cf. remarks of a former President of this Association, Hon. Samuel Seabury, quoted at VIII Wigmore, *Evidence* (3d ed.) §2275a.

Congressional committees investigating Communism. These investigations, and particularly the tactics of some of the more highly publicized committee members, were much resented by most of the liberal intelligentsia. Regrettably, at least from the point of view of the administration of justice, the opposition often took the form of uncritical praise and sweeping interpretation of the Amendment, together with historical references of doubtful validity. As one distinguished authority, Dean Erwin N. Griswold of the Harvard Law School said so well in the preface to the short book which he published in 1955, *The Fifth Amendment Today*, the issues "involve deep emotions, and it is not always easy to consider them dispassionately."

Limitations of space permit only a single illustration. I have chosen an outstanding one. In my view—and it is, I think, widely shared—the opinions of Justice Frankfurter are in general creative, soundly reasoned, masterpieces of expression and adorned with well organized and thorough research. On many of the numerous occasions on which I disagree with decisions of the Supreme Court, I am consoled by his devastating dissents. If so outstanding a scholar could err during this period, the tremendous force of the "deep emotions" of the intellectuals can be appreciated. And err, I am afraid, he did.

In 1947 in his separate opinion in *Adamson* v. *California*, 332 U.S. 46, Justice Frankfurter spoke of *Twining* in these terms: ". . . the judicial process at its best . . . one of the outstanding opinions in the history of the Court" (p. 59). Yet in 1956, in *Ullmann* v. *United States*, 350 U.S. 422, he made no mention of *Twining* but praised the Fifth Amendment with enthusiasm, and continued:[2]

> "Too many . . . readily assume that those who invoke it [the privilege] are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as

[2] At pp. 426–427.

> a condition to acceptance of the Constitution by the ratifying States."

Only one such patriot expressed himself on this particular issue in any writing now available to the public. That patriot, John Marshall, Chief Justice during the nation's formative years, was a most active delegate to the Virginia ratifying convention, the tenth convention so held and the first to propose the privilege against self-incrimination as an amendment to the Constitution.[3] Marshall was also a member of the Virginia Legislature when it ratified the Bill of Rights. Presiding at *United States* v. *Burr*,[4] he asserted that a witness was entitled to claim the privilege only when his answer would

> "complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would be stating every circumstance which would be required for his conviction . . . If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath . . ."

Thus the assumption to which Justice Frankfurter objected appears to do full honor to Chief Justice Marshall, perhaps the patriot best qualified to express himself on this issue and seemingly the only one who did.

Professor Mayers relegates the legislative witness to an appropriately minor role (15 pages).

His research is exhaustive. Inter alia, he shows incontrovertibly that the Amendment was intended to provide only that in a criminal prosecution the accused could not be required to testify. The Amendment thereby outlawed the procedure used in England prior to the eighteenth century and still used in countries "outside the domain of the common law"[5] by which a suspect is questioned by an "examining" magistrate, and if formally accused, questioned at the trial by the presiding judge. At common

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[3] 1 Beveridge, The Life of John Marshall, 401–480 (1916).
[4] 25 Fed. Cas. 38, 40 (No. 14,692e) (C.C.D.Va.).
[5] 211 U.S. 113.

law the witness, as such, did have a privilege against self-incrimination, but it was not embodied in the Fifth Amendment. Thus Chief Justice Marshall, in his fairly long opinion ruling on the invocation of the privilege by the witness Willie at the trial of Aaron Burr, made no mention of the then recently enacted Amendment.[6]

Professor Mayers demolishes much Fifth Amendment mythology circulated during the past decade, such as the theory that the vice of the Court of Star Chamber was the compulsory interrogation of suspects.

Professor Mayers doubts whether the privilege does protect the innocent because in substance it prevents the adoption of pre-trial discovery in criminal cases. Curiously his reasoning is reminiscent of that of the late Judge Jerome Frank in his book *Not Guilty,* describing a number of convictions later proved unjust. Judge Frank concluded that a possible remedy for these miscarriages of justice was pre-trial discovery comparable to that provided by the Rules of Civil Procedure. Although Judge Frank did not propose that discovery be available to the prosecution, to make this procedure available to the defendant only would so excessively favor him as to make adoption most unlikely. And court supervision of discovery such as provided by the Rules of Civil Procedure would assure that the "inquiry" was "orderly." Incidentally Judge Frank, a great champion of the Amendment, did not suggest in *Not Guilty* that pre-trial interrogation of the accused was a factor in any of the unjust convictions.

In this book Professor Mayers does not propose any specific revisions of the Fifth Amendment, but at the last meeting of the American Bar Association he moved resolutions (1) to exclude from the Amendment government employees questioned about official conduct, and (2) to permit incriminatory questions providing, and only providing, that the evidence thereby elicited was inadmissible against the witness. Such an amendment would overrule *Counselman* v. *Hitchcock,* 142 U.S. 547. *Counselman* held that only complete immunity would warrant such questions. As Professor Mayers shows, this decision rejected the uniform

[6] *Supra* note 4.

current of state court construction of similar provisions in state constitutions.

Being something of a traditionalist, I commenced my recently renewed study of the Fifth Amendment strongly pre-disposed in its favor. I now believe in outright repeal—a conclusion which is the basic thrust of Professor Mayer's presentation. (His proposed amendments appear to be *faute de mieux*.) The Amendment not only fails to protect the ordinary man caught in the toils, but fosters the conviction of the innocent in the sense that it is inconsistent with mutual pre-trial discovery. On the other hand, the Amendment is primarily responsible for the pathetic inability of our law enforcement and judicial apparatus under existing law to deal with hardened conspirators in the fields of Communism, labor racketeering and narcotics.

To express my view in phraseology used by the Supreme Court: What seemed in 1788 to be a "useful principle" is no longer useful. Although "justice would not perish if the accused were subject to a duty to respond to orderly inquiry," if he is not so subject the criminal courts will continue to be deprived of the tools found essential to the ascertainment of the truth and society will remain exposed to malevolent forces with consequences that cannot be foreseen.

A movement to amend or repeal the Amendment might encounter the "deep emotions" aroused in the intelligentsia by the Congressional investigations. Those emotions may not have subsided. But in the last few years congressional committees have been less subject to criticism and the objects of their investigations, labor racketeers, TV quiz cheats, drug manufacturers and the like have been less appealing people than teachers and intellectuals. Dean Griswold struck an encouraging note in a recent address at Northwestern University, saying "I think [Professor Mayers] would be surprised how far I agree with him in substance." 55 Northwestern L. Rev. 216, 219. Let us hope that Dean Griswold will lend the great weight of his authority to the reconsideration of this subject which is so urgently needed and which Professor Mayers has so admirably begun.

The Apalachin "Conspiracy"

By NANETTE DEMBITZ

Near the small village of Apalachin, New York, was the estate of Joseph Barbara, whom State police and Federal agents had long suspected of leadership in illegal gambling and racketeering activities in upstate New York. Indeed, State Trooper Croswell of Broome County had been keeping Barbara under surveillance for 13 years. This private—but not entirely covert—surveillance (Croswell testified that Barbara and his family sometimes watched from the window with annoyance when he took down the license numbers of their guests), became a public matter in November 1957 when it supplied the foundation for the Apalachin conspiracy prosecutions.

When a number of cars parked at Barbara's estate on a weekday November morning and there appeared to be only male guests, one might have suspected, along with Trooper Croswell, that something sinister might be afoot. One might have been further suspicious when the police found, by stopping Barbara's visitors with a roadblock as they left the estate, that there were about 60 male guests and that they included at least three men known (and since convicted) for connection with the narcotics trade. But, according to Croswell's testimony, he had suspected only "that there was something going on"; he didn't know what it might be.

The visitors gave various casual explanations for their presence. A number said they came to pay a sick call on a friend, since Barbara was critically ill (he died before the trial). A greater number gave a variety of other explanations: for instance, their car broke down near Barbara's; they had come to discuss individual business matters like buying bar equipment, or getting an order for fish; they had been invited to a party. The questioning at the roadblock and a country police station was followed by questioning by the FBI, a Congressional committee, the Internal Revenue Service, the New York State Crime Commission, and Federal grand juries—to name only some of the investigators. To none of them did the attendants admit to any significant reason for the gathering, or indeed, except for the few "party" explanations, that it was a planned gathering at all. Out of court some government officials speculated, on an overall estimate of underworld activities, that the Apalachin attendants gathered to arrange to sever connections with the narcotics trade and substitute other illegal activities.

Conceding that it could not prove the gathering had any illegal purpose, the Federal government indicted 27 of the attendants for conspiracy to obstruct justice and commit perjury, naming 36 others as co-conspirators. Under the government's view of its case, it only had to show the alleged conspirators agreed to give false and evasive answers in order to conceal the

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Editor's Note: Miss Nanette Dembitz (Mrs. Alfred Berman), a member of the Association's Committee on the Domestic Relations Court, serves as one of the counsel to the New York Civil Liberties Union and represented it in its appearance as *amicus curiae* in the Apalachin case.

purpose of the gathering, regardless of what the purpose was. At one point the prosecution enunciated the "tea-party" theory—that its case would stand up even if the only purpose of the gathering was to hold a tea-party, so long as the attendants agreed to lie about it.

The case was repeatedly in the headlines. Papers and magazines featured the indictment as a defeat for the Mafia; the conviction of 20 defendants was celebrated in most of the press as a victory over the efforts of the "Apalachin gangsters" to escape justice, and deplored in a very few places as a violation of Constitutional principles. The case was last headline news when the convictions were reversed last month by the Court of Appeals for the Second Circuit, in a trenchant and extremely painstaking opinion by Chief Judge Lumbard, with a concurring and likewise forceful opinion by Judge Clark (Judge Friendly was the third member of the Bench).[1]

The reversal was based on the insufficiency of evidence to show that the alleged conspirators entered into the charged agreement, and the Court did not find it necessary to rule on Constitutional questions. Nevertheless, the New York Times was right in denominating Chief Judge Lumbard as "Civil Rights Defender" for his opinion; it has significance not only for conspiracy cases but for the administration of justice generally.

Fundamentally, the Apalachin opinion re-asserts the simple truth that suspicion and the social desirability of sending bad men to jail is no substitute for proof of crime. The appeals court emphasizes the function of the trial judge to preclude unjust verdicts by carefully evaluating what inferences are permissible and warrant submission to the jury. Mindful of the growing use of conspiracy indictments, the Court warns:

> "We cannot state too strongly our view that it is incumbent on trial judges, in deciding whether the Government has made out a sufficient case to go to the jury, to analyze with meticulous care the evidence as to each defendant."

Justice, to this Court, does not mean perfunctory observance of the proper rules of law and forms of procedure. The jury must function meaningfully; it should not be asked to pass on evidence which, though relevant and fitting a customary mode of proof, is so complex and difficult that "a jury could not properly assess" it.[2] Above all, Judge Lumbard says, it is "improper to permit

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1 *United States* v. *Bufalino et al.*, decided Nov. 28, 1960, 29 U.S. Law Week 2245. The Court filed a 25-page appendix to its opinion, setting forth the alleged conspirators' explanations of their presence at Barbara's.

The government has announced it will not seek Supreme Court review.

2 The Court did not object to the sheer number of defendants and co-conspirators, which, as the Government stated, was approximately the same as in other recent conspiracy cases. It was concerned with the difficulty it (and therefore certainly the jury) experienced in analyzing and comparing the numerous statements to various officials by the alleged conspirators, and excerpts in Q and A form from their testimony in previous proceedings. (There were 84 Government witnesses, 105 alleged conspirators, and excerpts from previous testimony by 17 of them).

the jury to substitute a feeling of collective culpability for a finding of individual guilt." In short, the opinion maintains "our basic concepts of fair dealing" and, as Judge Clark puts it, disapproves "a relaxation of traditional standards" and the suggestion that in criminal law "crash methods have become a necessity."

While the Court does not rule on the important Constitutional question of the legality of the roadblock stoppage and interrogation, it comments on the rights of a citizen confronted by a policeman's questions. We shall return to these comments presently; they are of special interest in connection with the proposal in the Uniform Arrest Act, adopted in a few states, to grant policemen power to stop and question citizens on suspicion, though there are no circumstances justifying an arrest. The pamphlet distributed by the Civil Liberties Union and The Association of the Bar on "Your Rights When Arrested" could well be supplemented by instructions on "Your Rights If Not Arrested" (but merely detained for interrogation)!

Another significant feature of the Apalachin opinions is Judge Clark's treatment of publicity:

> "From its inception this case was given unusual and disturbing publicity in newspapers, journals, and magazines; and this unfortunate feature has persisted up to this date, with even the prosecutors indulging in highly colored accounts while the case had been pending on appeal . . .
>
> "Chief Judge Lumbard and Judge Friendly authorize me to state that they agree with the writer that the publication by former special prosecutors of accounts and comments regarding this case and the appellants, while this appeal was pending, was improper."

Bearing in mind that most discussion of the press and the courts has turned on "trial by newspaper" before or during a trial, the Court's disapproval of the prosecutors' comments pending appeal brings up a novel problem that will be examined at the close of this note.

I. *The Court of Appeals' Rulings on the Insufficiency of Evidence*

The evidence showed that at least some of the visitors at Barbara's were aware, about 40 minutes before they began to leave the estate, that the state trooper had them under surveillance. The theory of the government's case was that they left because they knew the police had its eye on them, and that in the 40-minute period an agreement was made to conceal, by false and evasive answers, the true purpose of the gathering from all investigating agencies, including Federal grand juries. To establish this agreement the government relied almost entirely on evidence that the visitors thereafter gave false answers about the gathering to various officials and investigating agencies.

The Court of Appeals agrees that "some, if not most, of the stories [of the visitors that they just dropped in on Barbara] were false since it is extremely unlikely that such a number of men would convene uninvited, some from far distant places, on a weekday, in a secluded country town." And the Court

accepts the format of proof that there was an agreement; it is, as the government contended, usual in a conspiracy case to infer from the acts allegedly done pursuant to an agreement that there had been an agreement. Nor did the judge's charge ignore the legal requirement in a conspiracy case of the existence of an agreement, though commentators have noted some tendency in this direction in other cases.

The difficulty here is the lack of factual probability that there had been an agreement to lie. "There is nothing in the record or in common experience," the Court says, "to suggest that it is not just as likely that each one present decided for himself that it would be wiser not to discuss all that he knew." At the outset, each on his own might well have decided to give evasive answers to the police to try to be rid of further inquiry; and after the hue and cry began about Apalachin, instead of an agreement, "it is just as reasonable to suppose that each one present would of his own volition decide that the less he said about Apalachin . . . the better for him." If all had given precisely similar explanations, this would be evidence of an agreement, but "statements similar only in that they denied that presence was planned" could as well be explained as individually motivated.

Here there was no physical interplay of movement as when A, B, and C engage in importing and distributing narcotics, and an agreement must be inferred because the coordination of activity could not have happened without agreement. Here the situation was similar to the anti-trust cases, where "parallelism"—say, the same distribution policy by a group of competitors—does not give rise to an inference of agreement if it can be explained by individual business interest (See *Theatre Enterprise, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537).

One may wonder whether those who allegedly continued to falsify even when under oath before the State Crime Commission and Federal grand juries would have done so without an implicit understanding that they would not be given the lie by their companions. But an implicit understanding does not launch a conspiracy; this crime "must be initiated by a communication of common intention and assent through physical means."[3]

The government also relied on evidence that sub-groups of 2, 3, or 4 of the alleged conspirators bolstered each other's accounts. For example, 1 of 2 driving companions originally said he had come to pay a sick-call and then allegedly changed his story to conform to his companion's statement that they had come to Barbara's because of car trouble. Supplying a sidelight on the frequent problem of distinguishing single from multiple conspiracies, a footnote dismisses this point, saying: "If true, this evidence points to the existence of several smaller conspiracies, not to the one of which all are accused."

Since the defendants were indicted for the Federal crimes of conspiracy to obstruct justice,—which has been held to relate only to judicial proceed-

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[3] See *Developments in the Law: Criminal Conspiracy*, 72 (1953) Harv. L. Rev. 920 at p. 926 (cited by the Court on a different point); compare *Grunewald* v. *United States*, 353 U.S. 391, and cases cited at p. 399.

ings,—and conspiracy to commit perjury, the government needed to show the conspiracy included an agreement to lie in a Federal court and under a Federally-administered oath. Here again the Court holds there was insufficient evidence: even if there had been an agreement to lie, there was insufficient evidence that it extended to this crucial point. The Court does not focus on the common issue in Federal conspiracy cases, emphasized in the government's argument, of Federal intent—whether the conspiracy was to commit Federal as well as State crimes (See *Ingram* v. *United States,* 360 U.S. 672). Rather, the Court holds there was no evidence permitting an inference that the alleged conspirators "envisaged proceedings where they would be called upon to testify under oath" or "foresaw or should have foreseen a formal investigation of the meeting" at all, considering there was not even evidence the gathering had had an illegal purpose.

The government's argument that the alleged agreement to conceal the purpose of the gathering would have made no sense unless it intended total concealment, and thus from Federal grand juries as well as other investigators, was deficient. The Court rejected the government's presentation of the problem as one of what intentions were necessarily included in a broad conspiratorial purpose (see *Pereira* v. *United States,* 347 U.S. 1, 12). To paraphrase Judge Learned Hand's view in *Crimmins,* it was not enough to say that if each conspirator had known of the possibility of a grand jury investigation, he would have made the charged agreement; this "would be no more than to say that he would have been willing to make an agreement which in fact he did not make" (*United States* v. *Crimmins,* 123 F. 2d 271, 273). The present Court perhaps affords a little leeway in regard to proof of knowledge on conspirators' part by formulating its ruling as:

> "there was insufficient evidence to support a finding that the defendants knew or *should have known* that there would be any formal investigation under oath." (italics added)

* * *

Legal theorizing could not compensate for the basic inadequacies in the facts the government could present about Apalachin: It could not show an illegal purpose in the gathering at Barbara's; and the explanations the visitors gave for their presence, even if untrue, were for the most part not perjurious. Lacking these aspects of guilt, the government's structure of inferences was too shaky to establish criminality.

II. *The Government's Circumvention of the Perjury Standard of Proof*

Though not necessary to the reversal of the convictions, the Court goes out of its way to emphasize the principle that the guilt of each defendant must be determined individually and that it is wrong to "substitute a feeling of collective culpability for a finding of individual guilt." The point here is that the improbability that over 50 persons would have coincided by chance

at Barbara's on the same weekday morning and the inference that many of the visitors must have lied when they said they came without pre-arrangement, does not in itself prove each individual lied. Any one man might have arrived because his car broke down, because he took a ride, etc., by sheer coincidence while the others were there. Indeed, a local farmer named Davis, who was one of the first through the roadblock, was not named in the indictment, the Government apparently assuming his presence was indeed by coincidence, for a casual personal reason. Considering that another local man, Guccia, was named as a conspirator, and the Court of Appeals says there was no evidence whatever of the falsity of his story that he had come to sell fish to Barbara, it may be hazarded that Davis too would have been named if he had had an Italian-sounding name.

It is interesting, from the standpoint of inferences permissible from a witness' incredibility, that the Government relied on minor inconsistencies in one defendant's story about the gathering and between his account and that of other witnesses, to establish that his statement on the major point of the purpose of his visit was also false. The Court, apparently rejecting this reasoning, states there was "not a shred of evidence" of the falsity of this defendant's explanation.

The difficulty of proving that each individual lied—despite the probability that many did—no doubt accounts for the fact noted by the Court that there have been no trials for perjury of any of the alleged conspirators in either State or Federal tribunals, in those instances where the alleged lies were repeated under oath. Because this indictment was instead for conspiracy to obstruct justice and commit perjury, the special perjury rule that there must, as the Court says, be "the testimony of two witnesses, or at least evidence stronger than the mere word of one man against the other," did not apply.

The Court indicates it values the maintenance of this stringent requirement of proof when the issue is the giving of false answers, and that it sets importance on distinguishing between the citizen's duty of truth when he is under oath as compared to less formal questioning. Mentioning both these factors, the Court says that by the form of the Apalachin prosecution "the government circumvents the salutary requirements of proof in perjury cases."

The thoughtful consideration of Chief Judge Lumbard, who was himself United States attorney, to the problem of culpability for falsehood, merits the most respectful attention.[4] A similar query as to the desirability of blurring the distinction in criminality between perjury and other falsity, is presented by New York's current prosecution of Manhattan Borough

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[4] It may be noted that the perjury standard is skirted on a large scale by the broad Federal false statements statute (28 U.S.C. 1001). It punishes wilful false statements "in any matter within the jurisdiction of any department or agency." There is no requirement that the statement be made under oath nor has the perjury standard of proof been observed in prosecutions under it (*Travis* v. *United States*, 269 F. 2d 928, C.A. 10, pending on certiorari, involves the latter issue).

President Hulan Jack; one charge is for conspiracy to obstruct justice by lying, not under oath, to the District Attorney in an attempt to deflect his investigation of Jack.

III. *Power of Police to Stop and Question Individuals on Suspicion*

The District Court held it was lawful for the police to stop Barbara's visitors at the roadblock and question them there and at a police station 7 or 8 miles away. The District Judge reasoned that the Fourth Amendment does not prohibit the police from subjecting individuals to interrogation in an investigation of suspected crime, even though there are insufficient facts to justify arresting them.[5] The Court of Appeals does not pass on this ruling; Judge Clark's opinion has a footnote that the roadblock and police station detention of defendants "seems highly dubious, and the admission of their statements in evidence of doubtful validity."

Though not ruling on the constitutionality of police interrogations, the Court discusses the situation of a citizen questioned by the police, in concluding that an agreement to lie could not be inferred from the alleged lies to the police. Judge Lumbard says:

> "Even an otherwise law abiding citizen who is stopped and interrogated by police, and who is given no reason for his detention and questioning, may feel it his right to give as little information as possible and even perhaps to respond evasively . . . That others may at times go to the brink of truth, or beyond, is likely, particularly when . . . they know that the existing law does not require them to give a truthful account to police officers."

Judge Clark adverts to the same point when he says "it is difficult to see how a defendant commits a wrong if he endeavors to preserve his privacy and individual freedom by misleading answers not perjurious in character."

The question of a policeman's power to stop and interrogate a suspect starts with consideration of the Fourth Amendment's prohibition of an arrest unless there is probable cause to believe the individual has committed a crime. When does police activity constitute an arrest, and what justification is required for police activity that is short of an arrest? The Supreme Court's latest opinions leave these questions still debatable. In *Henry* v. *United States,* the Court indicated that there is an arrest as soon as a policeman interrupts a person's passage and restricts his "liberty of movement" (361 U.S. 98, 100). However, last June's opinion in *Rios* v. *United States* (362 U.S. 972) indicates the possibility that this principle does not apply to every brief interruption for interrogation. The Supreme Court has not yet passed on the government's argument in several cases—accepted in part by the District Court in Apalachin—that even a detention of some hours for the purpose of inquiry is not an arrest and is therefore permissible on mere suspicion.

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[5] *United States* v. *Bonanno,* 180 F. Supp. 71 (S.D.N.Y.).

The Uniform Arrest Act proposed by the Interstate Commission on Crime and adopted with modification by a few states, provides that a policeman may stop any person whom he suspects on reasonable grounds of crime, ask him for identification, where he is going and why, and may detain him for a maximum of 2 hours for further questioning. One argument offered for the proposal is that it would bring the law into harmony with the methods the police use anyway, though without legal authority, and obviate their reliance on one pretext or another to question a suspect. Indeed, in the Apalachin case, Trooper Croswell testified he had begun his interrogation of Barbara's visitors by a demand to see the drivers' licenses because this power is given by the Traffic Law (and is usually accepted by a driver as lawful) even though his purpose was not in fact to enforce the Traffic Law.

But, granting that the police now engage in detention and interrogation without legal authority, certainly providing the authority would increase the practice. Thus, evaluation of the Uniform Arrest Act and of the District Court's opinion approving the Apalachin stoppages, involves a basic value judgment on the dangers of an ubiquitous form of police control and of police harassment, against the value to crime detection of interrogation of suspects. The truism that approval of a police practice affects the innocent as well as the guilty has special meaning here; the possibility of police interference with individuals who are in fact guiltless is obviously greatly increased if the police can act on suspicion rather than probable cause. The original basis for Trooper Croswell's stoppage of cars and interrogation of the persons leaving Barbara's,—which boiled down to the fact that they were at the home of a person suspected in a general way of criminal activity—is indicative of the possible dangers of police authority to detain and interrogate without probable cause.

If the police are to have the power to interrogate on suspicion, will the citizen have the duty to answer? The Court of Appeals points out in the Apalachin opinion that under existing law the citizen has no duty to answer truthfully if he is questioned by the police. Professor Sam Bass Warner of Harvard Law School who drafted and strongly favored the Uniform Arrest Act's provision for police power to interrogate, said it would be clearly unconstitutional to impose a duty to answer, but that generally a citizen will reply voluntarily. One may query whether the officer must not, to obey the Constitution, inform the suspect clearly and fully of his privilege against self-incrimination and whether, if this were done, he would be so likely to answer. Whether the privilege could and would be truly observed, if the authority to detain and interrogate were granted the police, seems questionable. And police station detention without observance of the privilege would seem a particularly apt situation for the type of coercion the privilege was intended to prevent.

The Apalachin opinion does not answer these questions as to whether there should, or constitutionally could, be an increase in the authority of the police, though its tone is on the side of those opposed to more pervasive police power. Judge Clark's evaluation seems conveyed in his disfavor

towards a situation where "a citizen's privacy is subject to invasion at any time on the mere suspicion of any police officer. . . ."

IV. *Magazine Articles by the Prosecutors*

Publicity was, as the opinions state, a problem in the Apalachin case from the beginning. The gap between rumor and evidence of record is indicated by the inaccuracy even of The New York Times. In its summary of the case following reversal of the convictions, it wrote: "Virtually all the men had bad police records; their names read like a Who's Who of organized crime." Yet the District Judge said: "About 25 out of the approximately 60 persons questioned had criminal records"; and the testimony shows that this statement refers to arrests as well as convictions and that some of these records consisted of minor traffic offenses.

Before the trial the gathering was featured in the press as a meeting of the Mafia, of "the hierarchy of the Eastern Seaboard Criminal World," and connected with "Murder, Inc." However, a good deal of the publicity ended with the defendants' arrests five months before trial, and the record shows that at the time of trial the prosecutor took positive steps to prevent trial by newspaper. At his instance a showing of a motion picture of "Inside the Mafia" was deferred in the District until after trial, as well as several TV shows. He also circulated a letter to all the news media in the area, calling attention to the Marshall case (360 U.S. 310) where the Supreme Court reversed a conviction because of newspaper publication during trial of the defendant's past criminal record, and he asked that so far as possible news comment be restricted to matters received in evidence. Denying motions for a continuance and change of venue, the trial judge pointed out that only "an infinitesimal amount" of the publicity was attributable to out-of-court statements by government officials. While Judges Lumbard and Clark comment on the extensive pre-conviction publicity, neither indicates the lower court's ruling on the motion was incorrect.

The articles to which Judge Clark apparently refers in his condemnation of publications by prosecutors pending appeal (quoted above, p. 49), were a two-part article in The Saturday Evening Post in July 1960 by the chief prosecutor "as-told-to" a writer, and an article by an assistant in Harper's in November 1960. To the prosecutor's the Post had affixed the unfortunate title, "How We Bagged The Mafia," and the second was called "Why The Crime Syndicate Can't Be Touched." While the articles mentioned that the convictions were on appeal—indeed the prosecutor states: "Since the convictions are under appeal, I do not want to comment on specific arguments . . ."—their tone is that the government had won the case and defendants gotten their over-due deserts. For instance, the Post "as-told-to" article says that the state trooper's hunch enabled him "to unmask the country's most powerful and elusive criminal syndicate." And it states as an established fact that all defendants lied,—a matter at issue on appeal—and that at the Apalachin gathering "the gangsters were discussing their monstrous business"—a statement not supported by evidence at all.

Less eye-catching than such dramatic flourishes in the writing, were the prosecutor's accounts of the law of conspiracy and his purpose "in collaborating on these articles . . . to urge, plead for, the creation of a permanent Federal prosecuting team to expedite closer cooperation among law-enforcement agencies" (incidentally, a similar view is now reported in the press to be supported by President-elect Kennedy).

What was the harm in these articles? The problem of publicity usually revolves around the trial level. If the jurors may have been influenced by publicity so that they failed to base their verdict on evidence, a conviction can be reversed for lack of due process, or on the less exigent basis of the appellate court's supervisory power over enforcement of criminal law (See *Delaney* v. *United States,* 199 F. 2d 107, C.A. 1). To determine whether the jurors can accord a fair trial, the trial judge may ask them whether they are prejudiced by what they have read—a device the Supreme Court regarded as unreliable in *Marshall* where it reversed the conviction despite the jurors' protestations that they were not influenced by press reports of the defendant's past criminal record. Perhaps here the current emphasis on use in the courts of social science techniques, might be helpful. For the psychologists and sociologists have done a great deal of work on interviewing techniques to determine an individual's attitudes, and they should be able to help lawyers and judges in formulating the proper questions for appraising prejudice on the part of the jurors.

The question of press influence on judges rather than jurors, has been considered in a series of appeals to the United States Supreme Court from convictions for contempt of court. Here more than in England we distinguish between the vulnerability of judges and juries. Even Justice Frankfurter, a fervent opponent of trial by newspaper, drew the distinction saying, "Judges are supposed to be made of sterner stuff than to be influenced by irresponsible statements regarding pending cases. They are trained to put aside inadmissible evidence" *(Maryland* v. *Baltimore Radio Show,* 338 U.S. 911, 913–914; opinion on denial of certiorari). And Justice Douglas—with *expertise* on the subject of verbal attacks!—wrote for the Court in *Craig* v. *Harney:* "Judges are supposed to be men of fortitude able to thrive in a hardy climate" (331 U.S. 367, 376). Justice Jackson, dissenting in *Craig* and supporting a contempt conviction for press criticism of a trial judge, commented: "Who does not prefer good to ill report of his work? And if fame—a good public name—is, as Milton said, the 'last infirmity of a noble mind,' it is frequently the first infirmity of a mediocre one."

But the majority, dismissing this human frailty, assumes there has been obedience to Justice Frankfurter's warning: "Weak characters ought not to be judges." (*Pennekamp* v. *Florida,* 328 U.S. 331, 357, concurring). The Court has repeatedly reversed contempt convictions for press comment on judicial behavior, although the articles included sharp admonitions to trial judges on how they should treat a pending application for probation or motion for a new trial, and one indicated the newspaper would not support the judge for reelection if he decided the other way.

In the contempt reversals, it is not only important that it is the judge, with

the armor of his training, rather than the jurors who is the target. Equally significant is the point that the publication does not merely deal in facts about a crime or a defendant, but rather comment on a government official's conduct of his office. Thus, freedom of political criticism,—the most important aspect of the free speech guarantee,—is involved, and this freedom outweighs the dangers from extra-courtroom pressure when the chance it will hit its mark is very slight or zero.

In the articles on the Apalachin case, the odium heaped on the defendants and the laudation of their conviction is in a sense a pressure for appellate affirmance—an implicit rebuke to a judge who would reverse the lower court judgment and free such evil men. Nevertheless, the tendency of articles of this type to actually affect a court, seems even less than the press comment in the contempt cases, because the latter involved trial judges. Appellate judges, removed as they are from the arena of factual battle and the physical presence of defendants, and also in time from the alleged criminal acts, seem more capable of detachment from pushes and pulls relating to the controversy, and from a possible tendency of trial judges to identify themselves with the prosecution.

The contempt cases discussed above did not involve prosecutors or attorneys, and it may be that the position of an attorney as an officer of the court would affect liability for contempt for out-of-court comment. But we shall not debate this issue. For the Court of Appeals in the Apalachin case was considering propriety, and the fact that conduct is not punishable as a contempt does not of course mean it is proper. The prosecutor should bear a special duty to protect the structure and administration of justice not only in fact but in the public eye. Propriety then requires him to abstain from comment that might give an impression of exerting extra-record pressure, albeit it is ineffective and would not be a contempt.

Further, articles such as those in the Post and Harper's may result in disrespect for the appellate process. With the convictions treated as a triumph for justice, appellate review and reversal would appear to be an unfortunate interference with a social accomplishment. The publications of a lawyer and especially a prosecutor should instead convey appreciation for appellate supervisory power over enforcement of the criminal law. And, regardless of a prosecutor's general fervor for a drive against criminals, in each prosecution the interest of the government "is not that it shall win a case, but that justice shall be done" (*Berger* v. *United States,* 295 U.S. 78). Indeed, if exonerating evidence comes to the prosecutor's attention it should be his duty to bring it before the court. A heart-and-soul fixation on conviction, or the role of a public relations man for the prosecution and against the defendants, even after trial, is inconsistent with the proper role of the prosecutor.

Finally, until the appellate process is exhausted, the assumption that a defendant is guilty is unfair and damaging; calling attention in these articles to one defendant who was a prominent civic leader in Buffalo, seems especially objectionable. Here the article has the vice of any hit-and-run attack on an individual by a government official: the charge carries the weight of

official knowledge, and the victim, even if he could command the press, is at a disadvantage in voicing a denial. This is the same sort of unfairness as when a grand jury, lacking basis for formal charges by indictment, brings in a presentment attacking individuals—a practice recently condemned in New York. Here again a prosecutor, who should be specially aware of the possibility of reversal, has a special obligation to refrain from exploiting a conviction pending appeal.

To say that this type of article by a former prosecutor is improper pending appeal, is not to say that ex-government officials must never write of their experiences. Unless the material involves a breach of confidence, there may be a real public interest in publication of information on governmental matters besides what is officially released. But publications dramatizing the guilt of defendants whose convictions may be reversed, and making statements concerning evidence which is in dispute in an appellate court, is not informational but mis-informational. And the impropriety of such publications by prosecutors outweighs the value of free expression of opinion.

For the most part, the Canons of Ethics only disapprove comments by an attorney which interfere with a fair trial or the due administration of justice. In the writer's view their injunction does not extend to comments pending appeal like the Apalachin articles. The Canons seem to refer to an actual tendency to affect cases, and there seems no likelihood of such articles actually influencing the course of appellate decision. To implement the Court of Appeals' instruction in the Apalachin opinion and the paramount purpose of fairness and impartial justice, amendment of the Canons is perhaps called for.

Committee Report

COMMITTEE ON PROFESSIONAL ETHICS

SUPPLEMENTAL INDEX TO PUBLISHED OPINIONS

The Cromwell Foundation Volume "Opinions on Professional Ethics" includes the opinions of the Association's Committee on Professional Ethics to Opinion No. 810. Published here is a supplemental index to the formal opinions published subsequently in THE RECORD and in the Year Books of the Association from 1956 through 1960:

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